

UNITED STATES DISTRICT COURT  
NORTHERN DISTRICT OF CALIFORNIA

EDWARD THOMAS,  
Plaintiff,  
v.  
R.T.C. GROUNDS, et al.,  
Defendants.

Case No. [13-cv-04367-CW](#) (PR)  
ORDER REVOKING PLAINTIFF'S IN  
FORMA PAUPERIS STATUS AND  
DISMISSING COMPLAINT

On September 20, 2013, Plaintiff Edward Thomas, a state prisoner currently incarcerated at Corcoran State Prison, filed a pro se civil rights action pursuant to 42 U.S.C. § 1983, alleging the violation of his constitutional rights by correctional officers at Salinas Valley State Prison (SVSP), where he was formerly incarcerated. On December 3, 2013, the Court granted Plaintiff's motion to proceed in forma pauperis (IFP). In reviewing Plaintiff's complaint and amended complaint, the Court found that, liberally construed, the complaints alleged cognizable claims for excessive force, retaliation, dangerous prison conditions and due process violations against SVSP officers. All other claims were dismissed. Subsequently, Defendants filed a motion for summary judgment.

On October 29, 2014, the Court issued an order directing Defendants to address whether Plaintiff's IFP status should be revoked pursuant to 28 U.S.C. § 1915(g) based on its ruling in another case filed by Plaintiff, Thomas v. Sepulveda, 2014 WL 5409064, \*2-4 (N.D. Cal.), that he had three previous cases that counted as strikes under 28 U.S.C. § 1915(g). In their responsive brief, Defendants argue that Plaintiff's IFP status should be revoked because he is a three-strikes litigant under § 1915(g) and his complaint does not allege that he is in imminent danger. Plaintiff has filed an "objection" to Defendants' response and a "rebuttal opposition."

#### LEGAL STANDARD

A prisoner may not bring a civil action IFP under 28 U.S.C. § 1915 "if the prisoner has, on 3 or more prior occasions, while incarcerated or detained in any facility, brought an action or appeal in a court of the United States that was dismissed on the grounds that it is frivolous, malicious, or fails to state a claim upon which relief may be granted, unless the prisoner is under imminent danger of serious physical injury." 28 U.S.C. § 1915(g).

For purposes of a dismissal that may count under § 1915(g), the phrase "fails to state a claim on which relief may be granted" parallels the language of Federal Rule of Civil Procedure 12(b)(6) and carries the same interpretation; the word "frivolous" refers to a case that is "'of little weight or importance: having no basis in law or fact,'" and the word "malicious" refers to a case "filed with the 'intention or desire to harm another.'" Andrews v. King, 398 F.3d 1113, 1121 (9th

1 Cir. 2005) (citation omitted). Only cases within one of these  
 2 three categories can be counted as strikes for § 1915(g)  
 3 purposes, so the mere fact that a plaintiff has filed many cases  
 4 does not alone warrant dismissal under § 1915(g). Id. Rather,  
 5 dismissal of an action under § 1915(g) should only occur when,  
 6 "after careful evaluation of the order dismissing an [earlier]  
 7 action, and other relevant information, the district court  
 8 determines that the action was dismissed because it was  
 9 frivolous, malicious or failed to state a claim." Id. A  
 10 dismissal under § 1915(g) means that a prisoner cannot proceed  
 11 with his action IFP under § 1915(g), but he still may pursue his  
 12 claims if he pays the full filing fee at the outset of the  
 13 action. Tierney v. Kupers, 128 F.3d 1310, 1311 (9th Cir. 1997).

#### 14 DISCUSSION

##### 15 I. Plaintiff's Strikes

16 Based on the Court's finding in Thomas v. Sepulveda, 2014 WL  
 17 5409064 (N.D. Cal.), that Plaintiff is a three strikes litigant  
 18 under § 1915(g), Defendants argue that he is collaterally  
 19 estopped from arguing that he does not have three strikes. In  
 20 Sepulveda, the Court found the following cases qualified as  
 21 strikes under § 1915(g): (1) Thomas v. Terhune, case no. 03-cv-  
 22 5467 (E.D. Cal.) (complaint dismissed for failure to state a  
 23 claim on which relief may be granted); (2) dismissal of the  
 24 appeal in Thomas v. Terhune, case no. 06-1501 (9th Cir. 2006)  
 25 (Ninth Circuit determined Plaintiff not entitled to IFP on  
 26 appeal, Plaintiff did not pay filing fee and appeal dismissed for  
 27 failure to prosecute); and (3) denial of the appeal in Thomas v.  
 28 Lamarque, case no. 07-16437 (9th Cir. 2007) (Ninth Circuit

1 determined appeal not taken in good faith, revoked Plaintiff's  
2 IFP status and dismissed appeal for failure to prosecute after  
3 Plaintiff failed to pay filing fee).

4 For collateral estoppel to bar relitigation of an issue, the  
5 following elements must be satisfied: (1) the issue at stake must  
6 be identical to the one alleged in the previous litigation; (2)  
7 the issue must have been actually litigated by the party against  
8 whom preclusion is asserted; and (3) the determination of the  
9 issue in the previous case must have been a critical and  
10 necessary part of the judgment. Trevino v. Gates, 99 F.3d 911,  
11 923 (9th Cir. 1996).

12 A comparison of this case with Thomas v. Sepulveda shows  
13 that all of the collateral estoppel requirements are satisfied.  
14 Plaintiff was the adverse party in Sepulveda, and the parties in  
15 that case litigated the same issue that is currently before this  
16 Court, that is, whether Plaintiff brought at least three actions  
17 or appeals that were dismissed on the ground that they were  
18 frivolous, malicious or failed to state a claim for relief.  
19 Sepulveda, 2014 WL 5409064, at \*1-2. That determination was a  
20 critical and necessary part of the judgment because it directly  
21 resulted in the dismissal of Plaintiff's action. Id. at \*5. The  
22 judgment in Sepulveda is final; on January 14, 2015, Plaintiff's  
23 appeal was dismissed because it was "so insubstantial as to not  
24 warrant further review." In re Edward Thomas, No. 09-80085 (9th  
25 Cir. 2015).

26 Furthermore, in Sepulveda, the Court determined that  
27 Plaintiff was collaterally estopped from challenging his three-  
28 strike status based on the findings in two other previous

1 district court cases, Thomas v. Felker, No. 09-cv-2486 FEC-CKD-P  
2 (E.D. Cal.), and Thomas v. Beutler, No. 10-cv-1300 MCE-CKD (E.D.  
3 Cal.). Sepulveda, 2014 WL 5409064, at \*3-4. Consequently,  
4 Plaintiff is collaterally estopped from arguing the three cases  
5 addressed in Sepulveda are not strikes under § 1915(g).

6 Defendants also submit that Plaintiff has five other appeals  
7 that qualify as strikes based on the fact that a pre-filing order  
8 was entered by the Ninth Circuit regarding Plaintiff's appeals  
9 and, subsequent to its entry, Plaintiff filed five separate  
10 appeals that the Ninth Circuit rejected as "so insubstantial as  
11 to not warrant further review." See Defs. Request for Judicial  
12 Notice, Ex. B at 2-3 (In re Edward Thomas, 09-80085, Ninth  
13 Circuit docket showing the dismissals, pursuant to the pre-filing  
14 order, of Plaintiff's appeals on January 12, 2011, September 6,  
15 2012, December 13, 2012, March 28, 2012, and May 29, 2013).<sup>1</sup> In  
16 dismissing these appeals, the Ninth Circuit cited In re Keith  
17 Thomas, 508 F.3d 1225, 1227 (9th Cir. 2007), in which it held  
18 that it may preclude an appeal from proceeding under a pre-filing  
19 order only "when it is clear from the face of the appellant's  
20 pleadings that: (i) the appeal is patently insubstantial or  
21 clearly controlled by well settled precedent; or (ii) the facts  
22 presented are fanciful or in conflict with facts of which the  
23 court may take judicial notice."

24  
25 <sup>1</sup> Defendants request judicial notice, under Federal Rule of  
26 Evidence 201, of proceedings in this Court, another district  
27 court and the Ninth Circuit Court of Appeals. This request is  
28 granted. See Bias v. Moynihan, 508 F.3d 1212, 1225 (9th Cir.  
2007) (court may take judicial notice of proceedings in other  
courts if they have a direct relation to the matters at issue);  
United States v. Wilson, 631 F.2d 118, 119 (9th Cir. 1980) (court  
may take judicial notice of its own records in other cases).

1 Plaintiff argues that the dismissals of his appeals do not  
2 count as strikes because they were not heard or adjudicated,  
3 which violates his right to appeal. Plaintiff is mistaken. As  
4 indicated on the Ninth Circuit's docket, from reviewing the face  
5 of each of Plaintiff's appeals it determined that each one was so  
6 insubstantial it warranted no further review. These dismissals  
7 are equivalent to dismissals for frivolousness or for failure to  
8 state a claim for relief and, thus, they count as strikes under  
9 § 1915(g). Therefore, Plaintiff has filed four cases and five  
10 appeals that qualify as strikes under § 1915(g). He may proceed  
11 under IFP status only if he was in imminent danger at the time he  
12 filed his complaint.

## 13 II. Imminent Danger

14 A plaintiff who has three strikes under § 1915(g) may still  
15 proceed IFP by showing that he or she "is under imminent danger  
16 of serious physical injury." 28 U.S.C. § 1915(g). This  
17 exception only "applies if the complaint makes a plausible  
18 allegation that the prisoner faced imminent physical danger at  
19 the time of filing" the complaint. Andrews v. Cervantes, 493  
20 F.3d 1047, 1055 (9th Cir. 2007). The complaint is the focus of  
21 the inquiry. Id.; Abdul-Akbar v. McKelvie, 239 F.3d 307, 312 (3d  
22 Cir. 2001) (en banc). The plaintiff must show a nexus between  
23 the imminent danger alleged in the complaint and the claims it  
24 asserts. Pettus v. Morgenthau, 554 F.3d 293, 299 (2nd Cir.  
25 2009). This means that the plaintiff must show that (1) the  
26 imminent danger of serious physical injury is fairly traceable to  
27 the unlawful conduct asserted in the complaint and (2) a  
28 favorable judicial outcome would redress that injury. Id.

1 Plaintiff's complaint was filed on September 20, 2013 and  
2 his amended complaint was filed on December 27, 2013. Doc. Nos.  
3 1 and 7. The allegations in the complaints assert claims against  
4 SVSP correctional staff for actions that occurred in 2012 and the  
5 beginning of 2013. In other filings, Plaintiff indicates that he  
6 was transferred to the California Substance Abuse Treatment  
7 Facility on July 3, 2013 and to Corcoran State Prison in February  
8 2014. See RJN, Ex. C at 1 (Plaintiff's Motion for Preliminary  
9 Injunction in Case No. 14-1157 CW (PR)). Neither the complaint  
10 nor the amended complaint alleges imminent danger of serious  
11 physical injury at the California Substance Abuse Treatment  
12 Facility, where he was housed when he filed the complaint, or at  
13 Corcoran State Prison, where he was transferred in February 2014  
14 and where he is now incarcerated. Even liberally construed,  
15 Plaintiff's allegations do not show that he was in imminent  
16 danger of serious physical injury at the time he filed the  
17 complaint on September 20, 2013, from Defendants' actions which  
18 occurred in 2012 and early 2013 at a different prison.

19 In response, Plaintiff argues that he filed his complaint on  
20 April 23, 2013 and the Court screened it on April 11, 2014. If  
21 this were true, he would have filed his complaint when he was  
22 still housed at SVSP. However, the Court's docket of his case  
23 establishes that his complaint was filed on September 20, 2013  
24 and the Court screened it on December 6, 2013. See Doc. Nos. 1  
25 and 6.<sup>2</sup>

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26  
27 <sup>2</sup> In his opposition, Plaintiff also argues he is in imminent  
28 danger based upon his lack of medical treatment. This complaint  
does not assert any medical claims; therefore, Plaintiff must be  
confusing this case with another case he has filed.

1 In his sur-reply, Plaintiff argues that he was prevented  
2 from filing his complaint at the time he experienced imminent  
3 danger because he was required to exhaust administrative remedies  
4 before filing it and he filed it as soon as he could. Under  
5 Ninth Circuit authority, this Court may only consider whether  
6 Plaintiff was in imminent danger at the time he filed his  
7 complaint, not at the time he filed his administrative  
8 grievances. Plaintiff also argues that he is still in imminent  
9 danger because "the State of California Department of Corrections  
10 and Rehabilitation's institutional facilities continue to subject  
11 Plaintiff to being placed in a cell with gang members, affiliates  
12 and associates." However, the California Department of  
13 Corrections and Rehabilitation (CDCR) is not a defendant in this  
14 action and Plaintiff cannot show that he was in imminent danger  
15 from the staff at the California Substance Abuse Treatment  
16 Facility or Corcoran State Prison merely because these  
17 institutions are under the auspices of the CDCR. Furthermore, as  
18 explained in the Court's denial of Plaintiff's motion for a  
19 preliminary injunction, the Court lacks jurisdiction over  
20 individuals at Plaintiff's present prison who are not parties to  
21 this action and, thus, a favorable judicial ruling on his claims  
22 would not redress his alleged present imminent danger. See Doc.  
23 No. 27 at 2-3.

24 Therefore, the imminent danger exception under § 1915(g)  
25 does not apply.

26 Accordingly, under § 1915(g), Plaintiff's IFP status is  
27 revoked and he is barred from proceeding IFP in this action.  
28 When IFP status is revoked pursuant to § 1915(g), the district



1 court may dismiss the action without prejudice to re-filing with  
2 payment of fees at the time the action is re-filed. See Tierney,  
3 128 F.3d at 1311 (under § 1915(g), case was properly dismissed  
4 without prejudice to re-filing with payment of filing fees).

5 CONCLUSION

6 Based on the foregoing, the Court orders as follows:

7 1. The Order entered on December 3, 2013 (Doc. No. 5),  
8 granting Plaintiff leave to proceed IFP, is VACATED and  
9 Plaintiff's IFP status is REVOKED.

10 2. This case is dismissed without prejudice to Plaintiff's  
11 re-filing it with payment of the \$400 filing fee.

12 3. The Clerk of the Court shall terminate all motions, enter  
13 a separate judgment and close the file.

14 IT IS SO ORDERED.

15 Dated: February 26, 2015

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17 CLAUDIA WILKEN  
18 United States District Judge  
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